Malayan Banking Bhd v Syed Ahmad Safar bin Syed Kechik

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(NCVC)(W)-1974–10 OF 2016
ABANG ISKANDAR, BADARIAH SAHAMID AND MARY LIM JJCA
24 MAY 2018

Civil Procedure — Striking out — Writ and statement of claim — Whether High Court wrongly allowed application to strike out plaintiff's writ and statement of claim after conducting 'trial by affidavits' — Whether contentious issues raised in affidavits could only be determined after full trial — Whether plaintiff's case was not 'obviously unsustainable' nor 'frivolous or vexatious' to warrant being struck out

The appellant had granted overdraft facilities to a company in which the respondent was a director. The respondent and two others had guaranteed repayment of the facilities. Following the company's failure to repay the facilities, the appellant sued the respondent and another guarantor after entering into a consent judgment with the company and the third guarantor. Among the defences raised by the respondent was that he was not served with the writ in the action (it had allegedly been served at his former address) and that the appellant's action was statute-barred. The respondent also contended that his signature on the loan documents was a forgery and relied upon a police forensic report to support the allegation. He also said he had never attended at the office of a solicitor ('Norali') to sign the loan documentation before Norali. When the respondent and his co-guarantor applied to strike out the appellant's writ and statement of claim under O 18 r 19 of the Rules of Court 2012, Norali filed an affidavit to say that he did witness the respondent's signature on the loan documents. Based on the respondent's various contentions, the High Court found it was a fit and proper case to allow the striking out application. The instant appeal was against that decision.

Held, allowing the appeal, setting aside the High Court's decision and ordering the matter to proceed to trial:

(1) The appellant's claim was neither 'obviously unsustainable' nor 'frivolous and vexatious' to warrant it being struck out (see para 27).

(2) The High Court judge had misdirected himself by prematurely determining a contentious fact, ie, that the respondent was not a party to the loan transaction, by making a 'finding of fact' that the respondent's purported signature on the loan documents was a forgery on the basis of a police expert forensic report. The judge clearly erred in arriving at such

a determination without the benefit of a trial where such contentious facts were tested by examination and cross-examination of relevant experts and witnesses (see para 30).

(3) The affidavit of the solicitor, Norali, affirmed that the respondent had signed the loan documents before him in his office but the respondent vehemently denied this and alleged that Norali had made a false declaration. The judge again clearly misdirected himself in believing the respondent's version without giving an opportunity to Norali to prove his allegation. Clearly, the judge had conducted a 'trial by affidavits' instead of leaving the determination of the contentious facts to the rigours of a full trial. For the same reasons, the other two issues were also issues of law and fact which could not be disposed of by way of trial by affidavits (see paras 31–32).

[Bahasa Malaysia summary

Perayu telah memberikan kemudahan-kemudahan overdraf kepada syarikat di mana responden adalah pengarah. Responden dan dua yang lain telah menjamin bayaran semula kemudahan-kemudahan tersebut. Berikutan kegagalan syarikat untuk membayar semula kemudahan-kemudahan tersebut, perayu menyaman responden dan penjamin satu lagi selepas memasuki penghakiman izin dengan syarikat dan penjamin ketiga. Di antara pembelaan-pembelaan yang dibangkitkan dengan responden adalah bahawa dia tidak diserahkan dengan writ dalam tindakan (ia didakwa telah diserahkan di alamat lamanya) dan bahawa tindakan perayu adalah dihalang masa. Responden juga berhujah bahawa tandatangannya atas dokumen-dokumen pinjaman adalah pemalsuan dan bergantung atas laporan forensik polis untuk menyokong dakwaan tersebut. Dia juga menyatakan dia tidak pernah hadir di pejabat peguamcara ('Norali') untuk menandatangani dokumentasi pinjaman di hadapan Norali. Apabila responden dan penjamin bersamanya memohon untuk membatalkan writ dan penyataan tuntutan perayu di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012, Norali memfailkan afidavit untuk menyatakan yang dia menyaksikan tandatangan responden atas dokumen pinjaman tersebut. Berdasarkan hujahan pelbagai responden, Mahkamah Tinggi mendapati ia adalah kes yang betul dan wajar untuk membenarkan permohonan pembatalan. Rayuan ini adalah terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan memerintahkan perkara untuk diteruskan kepada perbicaraan:

(1) Tuntutan perayu bukan 'obviously unsustainable' ataupun 'frivolous and vexatious' untuk mewajarkan ia dibatalkan (lihat perenggan 27).

(2) Hakim Mahkamah Tinggi telah salah arah dirinya dengan secara pra matang menentukan fakta bertikaian, iaitu, bahawa responden bukanlah pihak kepada transaksi pinjaman, dengan membuat 'finding of fact'

bahawa tandatangan responden ke atas dokumen-dokumen pinjaman adalah pemalsuan atas asas laporan pakar forensik polis. Hakim jelas tersilap dalam mencapai penentuan sedemikian tanpa faedah perbicaraan di mana fakta bertikaian diuji oleh pemeriksaan dan pemeriksaan balas pakar-pakar dan saksi-saksi relevan (lihat perenggan 30).

(3) Afidavit peguamcara, Norali, mengesahkan bahawa responden telah menandatangani dokumen di hadapannya di pejabatnya tetapi responden dengan tegas menafikan ini dan mendakwa bahawa Norali telah membuat pengisytiharan palsu. Hakim sekali lagi jelas salah arah diri dalam mempercayai versi responden tanpa memberikan peluang kepada Norali untuk membuktikan dakwaannya. Jelas, hakim telah melakukan 'trial by affidavits' sepatutnya membiarkan penentuan fakta bertikaian kepada perbicaraan penuh. Atas alasan yang sama, dua isu lain juga adalah isu undang-undang dan fakta yang tidak boleh didengar melalui perbicaraan oleh afidavit-afidavit (lihat perenggan 31–32).]

Notes

For cases on writ and statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9563–9581.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Legislation referred to

Limitation Act 1953 s 6(1)
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(d), O 92 r 4

Appeal from: Civil Suit No 22NCVC-45–04 of 2015 (High Court, Ipoh)

Lim Ta Wai (Khong & Son) for the appellants.
Brijnandan Singh Bhar (Angela Bong with him) (Brijnandan Singh Bhar & Co) for the respondent.

Badariah Sahamid JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge delivered on 21 September 2016, wherein the learned judge allowed the defendants' application to strike out the plaintiff's writ and statement of claim pursuant to O 18 r 19(1)(a), (b), and (d) of the Rules of Court 2012.

A **[2]** For ease of reference, parties will be referred to as they were in proceedings before the High Court.

BACKGROUND FACTS

B **[3]** The plaintiff, a commercial bank had granted overdraft facilities in the amount of RM3.5m to NSS Tenaga Sdn Bhd ('NSS') in which the second defendant was a director.

C **[4]** The loan was guaranteed by Aisah bt Itam (first defendant), Syed Ahmad Safar bin Syed Kechik (second defendant) and one Zainol bin Ramli.

[5] NSS defaulted on payment of the overdraft facilities.

D **[6]** The plaintiff instituted a suit against NSS and the guarantors (including the second defendant) vide Civil Suit No 22–34 of 2009 at the Ipoh High Court ('the 2009 Suit').

E **[7]** On 30 April 2010, the plaintiff withdrew the 2009 Suit with liberty to file afresh.

[8] On 4 April 2012, the plaintiff filed Civil Suit No 22NCVC-61–04 of 2012 ('the 2012 Suit') in respect of the same overdraft facilities against the same defendants as in the 2009 Suit.
F

[9] On 23 May 2012, the defendants filed their defence and counterclaim against the plaintiff, in which they alleged fraud and forgery in respect of the signatures to the loan documents. The defendants had also lodged police reports on the matter.
G

[10] On 27 November 2012, a consent judgment was entered between the plaintiff and NSS and a guarantor, Zainol bin Ramli. The 2012 Suit against the defendants was withdrawn by the plaintiff. There was nothing in the notes of proceedings to indicate that the 2012 Suit was withdrawn with no liberty to file afresh.
H

[11] When NSS and Zainol failed to comply with the terms of payment under the consent judgment, the plaintiff, on 13 April 2015, filed another suit vide Civil Suit No 22 NCVC-45–04 of 2015 against the first and second defendants ('the 2012 Suit').
I

[12] Among the defences raised by the second defendant was that the second defendant was not served with the writ to the 2012 Suit. The writ was served at

the second defendant's former address as stated in his old identification card ('IC') and not at his current address as stated in his IC.

[13] The second defendant also contended that the action of the plaintiff was statute barred. In addition, the plaintiff could not institute the 2012 Suit as when the 2012 Suit against the defendants was withdrawn by the plaintiff, there was no liberty to file afresh.

ISSUES BEFORE THE HIGH COURT

[14] The learned High Court judge had determined that the issues before him were as follows:

(a) whether there was a clear and obvious case for a striking out of the plaintiff's writ of summons and statement of claim against the second defendant who was not a party to the loan transaction?

(b) whether the plaintiff's claim against the defendants is statute barred under s 6(1) of the Limitation Act 1953? and

(c) whether the service of the writ in the 2015 Suit on the second defendant was bad as it was not served at the current address of the decond defendant as stated in his IC?

FINDINGS AND DECISION OF THE HIGH COURT

[15] The learned judge found that this was a fit and proper case to warrant striking out the plaintiff's claim against the second defendant pursuant to O 18 r 19(1)(a), (1)(b), (1)(d) and O 92 r 4 of the Rules of Court 2012. The findings and decision of the learned judge may be summarised as follows.

The second defendant was not a party to the loan transaction between the plaintiff and NSS

[16] The second defendant had raised the defence that the signature on the loan documents which was purported to be his signature was a forgery. This was not a mere denial as this was supported by a police forensic report.

[17] The second defendant had also denied going to the office of Norali bin Nordin, a solicitor, or that he had signed the said documents in the presence of the abovementioned solicitor. Norali had affirmed in his affidavit that he had witnessed the second defendant's signature on the loan documents. The second defendant had lodged a police report against Norali and a complaint with the Disciplinary Board of the Bar Council on the alleged false attestation.

[18] While the primary debtor, NSS and a guarantor, Zainol, had admitted to the loan facilities in the 2012 Suit, their liability cannot be extended to the second defendant. Any payments made by NSS, the principal debtor does not revive the action against the second defendant.

[19] The second defendant was also not a party to the consent judgment entered into between the plaintiff, NSS and a guarantor, Zainol. The defendants can thus regard the matter as having been conclusively resolved.

The plaintiff's suit against the defendants is barred by the six year limit under s 6(1) of the Limitation Act 1953

[20] The cause of action against all the defendants accrued when the plaintiff commenced the 2009 Suit on 24 February 2009. Thus the plaintiff is obliged to file the suit against the defendants on or before 23 February 2015. Since the plaintiff had filed this suit on 13 April 2015, the plaintiff's suit is caught by the Limitation Act 1953.

Service of the writ

[21] The writ was served on the second defendant's last known address at No 16, Lorong Bendahara, Jalan Langgar, 05300 Alor Setar, Kedah. However, the second defendant's address according to his IC is No 1495, Taman Mutiara, Jalan Sultanah, 05350 Alor Setar, Kedah. The non-service of the 2015 writ on the second defendant was fatal to the plaintiff's claim.

[22] In addition, the learned judge was unable to find in the hand written notes of proceedings of the judge who had heard the matter previously, a written note that the plaintiff had applied for and was given liberty to file afresh. In the absence of such leave, the plaintiff's 2012 Suit was an abuse of the process of the court.

[23] For all the reasons stated above, the learned judge made the finding that the second defendant's application to strike out the plaintiff's claim pursuant to O 18 r 19(1)(a), (b) and (d) was within the scope of the abovementioned order as well as O 92 r 4 of the Rules of Court 2012.

OUR DECISION

[24] After a careful consideration of the written and oral submissions of learned counsels, as well as a perusal of the appeal records, we were of the view that there are merits in this appeal that warrant appellate intervention. Accordingly, we allowed the plaintiff/appellant's appeal with costs and set aside the order of the High Court. The grounds of our decision are set out below.

[25] At the outset, it is worthy of note that what is on appeal before us is the decision of the learned judge to strike out the plaintiff's claim under O 18 r 19(1)(a), (b), and (d) of the Rules of Court 2012. The principles according to which a court may strike out a claim are well established but bears repeating. In the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, the Supreme Court had stated as follows:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule ..., and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence ... The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[26] It is apparent to us that the plaintiff's claim was neither 'obviously unsustainable', nor 'frivolous or vexatious' to warrant it being struck out.

[27] It is not disputed that the plaintiff had granted loan facilities to NSS and that the second defendant was at the material time a director of NSS. The principal defence raised by the second defendant was that he was not a party to the loan transaction as his signature on the loan documents had been forged.

[28] We note, that even at the outset, in the framing of the first issue for determination, the learned judge had misdirected himself by a premature determination of a contentious fact ie that the second defendant was not a party to the loan transaction.

In his grounds of judgment, at para 21, he had stated thus:

> Isu-isu utama yang perlu dipertimbangkan oleh Mahkamah untuk mencapai keputusan ini adalah:
>
> (i) sama ada terdapat kes yang jelas dan nyata bagi 'writ of summons' dan pernyataan tuntutan plaintif dibatalkan kerana Plaintif telah memulakan dan melaksanakan tindakan guaman tersebut terhadap defendan kedua yang bukannya pihak kepada perjanjian pinjaman.

[29] The learned judge then proceeded to make a 'finding of fact' that the signature on the loan documents purported to be that of the second defendant was a forgery on the basis of a police expert forensic report. The learned judge had clearly erred in arriving at such a determination without the benefit of a trial where such contentious facts may be tested by examination and cross-examination of relevant experts and witnesses.

[30] This is especially so since what was before the High Court was the affidavit of the solicitor, Norali bin Nordin, who had affirmed that the second defendant had signed the loan documents before him in his office. The second defendant had vehemently denied this and alleged the solicitor to have made a false declaration and lodged a police report as well as a report to the Bar Council. Be that as it may, the learned judge had clearly misdirected himself in believing the version of the second defendant without giving the opportunity for the solicitor to prove his allegation. Clearly, the learned judge had conducted a 'trial by affidavits', instead of leaving such contentious fact finding matters to the rigours of a full trial.

[31] On this ground alone, we are of the considered view that the learned judge was plainly wrong. For the same reasons, the other two issues are issues of mind fact and law which also cannot be disposed of by way of a trial by affidavits. We therefore allowed the appeal and set aside the order of the High Court. Accordingly, we ordered the matter to proceed for trial at the High Court. We also ordered costs in the cause and deposit to be refunded to the appellant.

Appeal allowed; High Court's decision set aside.

Reported by Ashok Kumar